STATE OF MICHIGAN

COURT OF APPEALS

UNIONVILLE-SEBEWAING AREA SCHOOLS, Plaintiff-Appellee,	UNPUBLISHED January 29, 2004
v	No. 242084 Ingham Circuit Court
MASB-SEG PROPERTY CASUALTY POOL, INC., Defendant-Appellant.	LC No. 00-092892-CZ

Before: Zahra, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Following a bench trial, the trial court awarded plaintiff Unionville-Sebewaing Area Schools' request for a declaratory judgment regarding the damages it incurred due to defendant MASB-SEG Property Casualty Pool, Inc.'s breach of contract. Defendant appeals as of right. We affirm.

This case arises out of defendant's refusal to defend and indemnify plaintiff against a suit brought to recover an allegedly improper payment of $332,211.67 made to plaintiff by a bankrupt entity.

In 1994, plaintiff entered into an investment advisory agreement with Devon Capital Management, Inc., (DCMI) for investment advice. In accordance with the agreement, plaintiff invested $332,211.67 with DCMI. On July 6, 1994, Financial Management Sciences, Inc. (FMS) transferred $332,211.67 to plaintiff for claims asserted by plaintiff against DCMI. FMS allegedly received no consideration for this transfer and was insolvent during this period. Based on the transfer of $332,211.67 to plaintiff, the trustee in bankruptcy of the bankrupt FMS brought suit against plaintiff to recover the funds. The four-count complaint alleged: (1) fraudulent conveyance; (2) money had and received; (3) unjust enrichment; and (4) conversion. All four counts also alleged the alternate theory that plaintiff received monies to which plaintiff was not legally entitled.

Defendant argues that the trial court erroneously applied the "reasonable expectations" doctrine despite unambiguous policy language that excluded coverage in this case.[1] A review of the record, however, reveals that the trial court granted plaintiff declaratory judgment based on principles of contract interpretation. The trial court explained that the insurance contract was sufficiently ambiguous, such that defendant should have defended it on the basis of reservation of right. To the extent defendant asserts this was error, we disagree.

As a general rule, an insurer's duty to defend is broader that its duty to indemnify.[2] "'In order to determine whether an insurer has a duty to defend its insured, this Court must look to the language of the insurance policy and construe its terms to find the scope of the coverage of the policy.'"[3] The proper interpretation and construction of an insurance contract is a question of law that we review de novo on appeal.[4] We rely on well-settled principles of contract construction when construing an insurance policy.[5]

"'An insurer is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy.'"[6] Exclusionary clauses in insurance policies are subject to strict construction.[7] An ambiguous policy will be interpreted against the insurer to require coverage.[8] If the contract is unambiguous and internally consistent, contractual interpretation is confined to the actual words within the agreement.[9] "A contract is ambiguous if its provisions may reasonably be understood in different ways."[10]

Defendant asserts that it had no duty to defend because the four counts against plaintiff involved the receipt of monies to which plaintiff was not entitled. In this regard, defendant cites exclusion (d), which exempts coverage for "any claim arising out of the gaining in fact of any personal profit or advantage to which the insured is not legally entitled . . . ." Defendant maintains that these claims amounted to claims that plaintiff improperly gained a personal profit or advantage.

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[1] We note that our Supreme Court recently abolished the use of "reasonable expectations" in contract interpretation. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776 (2003).

[2] *Radenbaugh v Farm Bureau General Ins Co of Michigan*, 240 Mich App 134, 138; 610 NW2d 272 (2000).

[3] *Id.*, quoting *Royce v Citizens Ins Co*, 219 Mich App 537, 542; 557 NW2d 144 (1996).

[4] *Wilkie*, *supra* at 47.

[5] *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 332, 632 NW2d 525 (2001).

[6] *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 568, 596 NW2d 915 (1999), quoting *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161, 534 NW2d 502 (1995).

[7] *Zurich-American Ins Co v Amerisure Ins Co*, 215 Mich App 526, 533; 547 NW2d 52 (1996).

[8] *Royce*, *supra* at 542-543.

[9] *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001).

[10] *Id.*

In support of this claim, defendant cites *Jarvis Christian College v National Union Fire Ins Co*.[11] *Jarvis* involves a similar errors and omissions policy with a section that parallels the exclusion (d) provision in the instant case regarding personal profit.[12] However, *Jarvis* concerns a member of the board of directors who breached his fiduciary duty by recommending that the college invest two million dollars into a company that he partially owned.[13] In part because the board member was plaintiff's representative and achieved a personal profit in that capacity, the defendant insurer concluded that it had no duty to defend under the policy. [14] The Court agreed and held that defendant insurer had no duty to defend under the policy where plaintiff's board member gained a personal profit or advantage from the two million dollar transfer.[15]

Jarvis is factually distinguishable from the instant case. Here**,** plaintiff had an investment agreement with DCMI for investment advice. As a result of a claim plaintiff made against DCMI, FMS paid plaintiff $332,211.67. There is no record evidence that plaintiff gained a personal profit or advantage as a result of receiving this money from FMS.

Further review of the record also supports the trial court's grant of plaintiff's request for declaratory judgment. Here, the trial court found the contract sufficiently ambiguous such that defendant would suffer the consequences of refusing to defend plaintiff on the basis that there was no coverage. In reaching this decision, the trial court examined the portion of the contract stating that defendant "shall have the right and duty to defend any action or suit brought against the Insured alleging a Wrongful Act, even if such action or suit is groundless, false or fraudulent." The trial court then noted that the contract defined a "wrongful act" as "any actual or alleged breach of duty, neglect, error, misstatement, misleading statement or omission" committed while performing duties solely for the school district.

The trial court also examined exclusionary clause (a), which precludes coverage for "any claim involving allegations of fraud, dishonesty, or criminal acts or omissions" but then states that "the insured shall be reimbursed for all amounts which would have been collectible under this policy if such allegations are not subsequently proven." The trial court held that defendant had a duty to defend plaintiff against any suit alleging a wrongful act, even if the allegations were groundless, because the exclusionary clause provided the insured would be reimbursed under the policy for any allegations not subsequently proven. Where *any* of "'the allegations of

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[11] *Jarvis Christian College v National Union Fire Ins Co*, 197 F3d 742 (CA 5, 1999).

[12] *Id*. at 747.

[13] *Id*. at 744, 747.

[14] *Id*. at 745.

[15] *Id*. at 747-748.

the underlying suit arguably fall within the coverage of the policy, the insurer has a duty to defendant its insured.'"[16] Because the allegations made against plaintiff were arguably within the terms of the policy coverage, the trial court properly held that defendant had a duty to defend.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper

[16] *Radenbaugh, supra* at 137, quoting *Royce, supra* at 543.